CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA
v.
ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-45-A Decided September 12, 1995

Appeal from a decision concerning the acquisition of land in trust for the Absentee-Shawnee Tribe within the former Potawatomi Reservation in Oklahoma.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Trust Acquisitions--Indians: Reservations: Definition

   The Bureau of Indian Affairs' definition of a "former reservation" under 25 CFR 151.2(f), for purposes of acquisition of land in trust for Indians, is subject to de novo review by the Board of Indian Appeals.

2. Indians: Lands: Trust Acquisitions--Indians: Reservations: Definition

   For purposes of 25 CFR Part 151, the Citizen Band Potawatomi Indian Tribe and the Absentee-Shawnee Tribe both have rights in the former Potawatomi Reservation in Oklahoma, and neither is required to obtain the consent of the other under 25 CFR 151.8.

APPEARANCES: Michael Minnis, Esq., and David McCullough, Esq., Oklahoma City, Oklahoma, for appellant; Keith S. Francis, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Citizen Band Potawatomi Indian Tribe of Oklahoma (Citizen Band) seeks review of a September 17, 1992, letter signed by the Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA). The letter stated Area Office policy concerning the acquisition of land in trust for the Absentee-Shawnee Tribe of Indians of Oklahoma (Absentee-Shawnee Tribe) within the former Potawatomi Indian Reservation in Oklahoma (Potawatomi Reservation 1/). For the reasons discussed below, the Board affirms the Area Director's decision.

1/ This appeal involves the relative rights of the Citizen Band and the Absentee-Shawnee Tribe in this reservation. The Board uses the

Procedural Background

On August 25, 1992, the Chairman of the Citizen Band wrote to the Area Director, stating that he had learned that the Absentee-Shawnee Tribe had requested or would request BIA to take land in trust for it within the original boundaries of the Potawatomi Reservation. The Chairman stated that the Citizen Band was opposed to any such trust acquisitions for the Absentee-Shawnee Tribe. He requested that the Area Director respond to the Citizen Band's objections and that he articulate BIA policy concerning the matter.

The Area Director responded on September 17, 1992. He acknowledged that, under 25 CFR 151.8, the consent of the governing tribe of a reservation must be obtained before land within the reservation may be acquired in trust for another tribe. 2/ However, he also stated: "[W] e believe the Citizen Band of Potawatomi Indians and the Absentee-Shawnee Indian Tribe of Oklahoma share a common former reservation area for purposes of fee simple acquisitions, and neither are required to secure nonmember consents required by 25 Code of Federal Regulations, 151.8" (Area Director's Sept. 17, 1992, Letter at 2). In support of his statement concerning a shared reservation, the Area Director stated:

> By Act of Congress approved May 23, 1872 (17 Stat., 159), titled Chap. CCVI. - An Act to provide Homes for the Pottawatomie and Absentee Shawnee Indians in the Indian Territory, the Secretary of the Interior was directed to issue certificates by which allotments of land lying within the thirty-mile square tract heretofore selected for the Pottawatomie Indians, and lying next west of the Seminole reservation in the Indian Territory, was to be made to each member of the Pottawatomie band, known as the Pottawatomie citizen band and to each Absentee Shawnee

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fn. 1 (continued)
term "Potawatomi Reservation" because that is the term which appears most often in the historical documents, although at least one document--the Sept. 18, 1891, Presidential Proclamation opening the reservation to settlement--refers to the reservation as the "Pottawatomie (and Absentee Shawnee) Reservation[]." 27 Stat. 989, 992.

The Board's use of the term "former" should not be taken to mean that the Board itself has concluded that the reservation has been terminated. The term merely reflects a common understanding. See discussion infra.

2/ 25 CFR 151.8 provides:

"An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired."

> Indian. The above specifically provided the Absentee Shawnee and Pottawatomie citizen band certificates include the same provisions.
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> In the different pieces of legislation researched, a number of designations were given the thirty mile square tract lying west of the Seminole reservation in the Indian Territory: "lands selected for the Pottawatomie Indians," "Potawatomie (and Absentee Shawnee) Reservations," "Potawatomie Reservation," however, we do not believe any can be construed to be a declaration establishing a former reservation area solely for the Citizen Band Potawatomi Indian Tribe of Oklahoma. Both tribes occupied the area on the same terms prior to March 3, 1891, wherein the Citizen Band of Potawatomi Indians of the Indian Territory and the Absentee Shawnee Indians of the Indian Territory simultaneously ceded and opened to public settlement lands included in "Schedule of lands within the Sac and Fox, Iowa, Potawatomie (and Absentee Shawnee) Reservations, in Oklahoma Territory."

Id. at 1-2. The Area Director's letter did not include appeal instructions.

On October 30, 1992, the Citizen Band filed suit in Federal district court, seeking a declaration that the Potawatomi Reservation is the reservation of the Citizen Band alone and that BIA is therefore required to obtain the consent of the Citizen Band before taking land within the reservation in trust for the Absentee-Shawnee Tribe. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier, No. CIV-92-2161-R (W.D. Okla.) .

The district court dismissed the Citizen Band's complaint on February 2, 1993, for failure to join an indispensable party, the Absentee-Shawnee Tribe. Although the Area Director had also sought dismissal on the grounds that the Citizen Band had failed to exhaust administrative remedies, the court did not reach that argument.

The Citizen Band appealed the dismissal. On February 25, 1994, the United States Court of Appeals for the Tenth Circuit, holding that the Absentee-Shawnee Tribe was not an indispensable party, reversed the district court's order of dismissal and remanded the matter for further proceedings. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier, 17 F.3d 1292 (10th Cir. 1994).

Back in the district court, the parties argued the question of whether the Citizen Band was required to exhaust administrative remedies. On August 5, 1994, the court issued an order stating: "The Court reserves ruling on the motion to dismiss for failure to exhaust administrative remedies. The [Citizen Band] is to pursue the administrative remedies (if any) from the September 17, 1992, letter from [the Area Director]] to [the Citizen Band's] Chairman."

By letter of October 12, 1994, the Area Director informed the Citizen Band that it could appeal his September 17, 1992, letter to this Board.

The Citizen Band then filed a notice of appeal with the Board. Although the notice was filed more than 30 days after the Citizen Band received the Area Director's September 17, 1992, letter, the Board accepted the appeal as timely filed because the September 17, 1992, letter did not provide appeal information. 3/

The appeal was docketed on November 28, 1994. The Citizen Band and the Area Director filed briefs.

Although fully informed of these proceedings and, in particular, of its right to file a brief, the Absentee-Shawnee Tribe did not file a brief during the briefing period established in the notice of docketing for this appeal. Briefing was completed on February 20, 1995, when the Citizen Band filed its reply brief. On April 17, 1995, the Board received a motion from the Absentee-Shawnee Tribe, seeking to file a brief as amicus curiae. The Board denied the motion, noting, inter alia, that the Tribe failed to give any explanation for the extreme lateness of its request. 4/

3/ 25 CFR 2.7 provides:

"(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

"(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

"(c) All written decisions * * * shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

4/ In August 1994, the Governor of the Absentee-Shawnee Tribe wrote to the Area Director, objecting to the acquisition of land in trust for any tribe other than itself within the "former Absentee-Shawnee Tribal Reservation." The Area Director responded on Oct. 19, 1994, making, in essence, the same statements he made in his Sept. 17, 1992, letter to the Chairman of the Citizen Band. The Oct. 19, 1994, letter included a statement informing the Absentee-Shawnee Tribe that it could appeal the letter to this Board. The Tribe did not appeal.

The Absentee-Shawnee Tribe did not participate in the Federal court proceedings at any stage and has made only a belated and half-hearted attempt to participate in the present appeal. In failing to pursue its right to appeal and/or to participate in any of these several proceedings, the Tribe has demonstrated a puzzling lack of interest in a matter that would appear to be of vital concern to it.

Even so, the Board is not free to disregard the rights of the Absentee-Shawnee Tribe. The Department of the Interior, including this Board, bears a trust responsibility toward both the Citizen Band and the Absentee-Shawnee Tribe. In the context of this appeal, the trust responsibility obligates the Board to consider the rights of both tribes, regardless of their participation, or lack thereof, in this appeal.

Historical Background

By a treaty entered into on February 27, 1867, the Citizen Band agreed to move from Kansas to the "Indian country south of Kansas." Preamble, Treaty of Feb. 27, 1867, 15 Stat. 531, 535. It was agreed that if the location selected

> shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Potawatomie nation.

Id. at Art. I. In accordance with the treaty, a tract of land was selected by the Citizen Band in February 1870 and approved by the Secretary on November 9, 1870. The tract comprised approximately 575,877 acres, of which about two-fifths had been acquired by the Government from the Creek Nation and about three-fifths from the Seminole Nation. 5/ Citizen Band of Potawatomi Indians of Oklahoma v. United States, Findings of Fact in Docket 96, 6 Ind. Cl. Comm. 646, 650-51 (1958).

> The so-called Absentee Shawnees had separated from the body of the Shawnee Nation during the early 1840's and had settled at the time within the tract selected in 1870 by the Potawatomies. * * * They remained loyal to the Union during the Civil War and suffered severe losses of livestock and crops because of their loyalty and were driven from Oklahoma. However, by 1870, they * * * had moved back to their homes on the tract which was a portion of the tract selected as a reservation for the Citizen Band * * *.
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> In February 1872, the Absentee Shawnee addressed a petition to the President * * * praying that the President give them title to a portion of the land on the Potawatomie reservation * * * upon which lands they had made their homes and had constructed valuable improvements over a period of many years.
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> [The petition was sent forward by BIA officials with recommendations for approval. The BIA Superintendent] reported that the Potawatomi had expressed a willingness not to disturb the Absentee Shawnee, but had asked that their reservation be extended westward so as to include an additional equivalent area. [Emphasis in original.]

Id. at 651-52.

5/ See Treaty with the Creek Nation, June 14, 1866, 14 Stat. 785; Treaty with the Seminole Nation, Mar. 21, 1866, 14 Stat. 755.

The Absentee Shawnee petition was brought to the attention of Congress, evidently by the Secretary of the Interior. Id. at 652. At about the same time, the Secretary requested that legislation be enacted to provide for allotments to members of the Citizen Band. 6/ In evident response to these requests, Congress enacted the Act of May 23, 1872, 17 Stat. 159 (1872 Act), providing for allotments to Citizen Band members and Absentee Shawnees within the Potawatomi Reservation. Section 1 of the Act provided for allotments to members of the Citizen Band. Allotments to heads of families and adults were to include not more than one-quarter section, and those to minors not more than 80 acres. Allotments were to be made to those members who had "resided or shall hereafter reside three years continuously on such reservation" and were to be paid for, either directly by the allottees or from funds held by the United States for the Citizen Band.

Section 2 of the 1872 Act provided for allotments within the Potawatomi Reservation to be made to "any Indian of pure or mixed blood of the Absentee Shawnees, being a head of a family, or a person over twenty-one years of age, [who] has resided, continuously, for the term of three years within [the reservation], and has made substantial improvements thereon." Each such Absentee Shawnee adult was to be allotted 80 acres, with an additional 20 acres for each child under 21. There was no provision requiring the Absentee Shawnees to pay for their allotments.

Only 11 Citizen Band members paid for and received allotments under the 1872 Act. No Absentee Shawnees were allotted under that Act. 6 Ind. Cl. Comm. at 653. 7/

On February 8, 1887, Congress enacted the General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. § 331 (1994). 8/ On May 23, 1887,

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6/ Mar. 15, 1872, Letter from the Secretary to the Speaker of the House of Representatives, reprinted in H.R. Exec. Doc. No. 203, 42d Cong., 2d Sess. (1872). The Secretary stated that the reservation lands could not be conveyed to the Citizen Band as contemplated in the 1867 treaty because all Potawatomis had become citizens and the Potawatomi Nation was deemed extinct. Therefore, he stated, legislation was necessary "in order that justice may be done to the Pottawatomies who have removed to this land" (H.R. Exec. Doc. No. 203 at 4).

7/ See also May 17, 1887, Letter from the Acting Commissioner of Indian Affairs to the Secretary of the Interior, reprinted in "Letter from the Secretary of the Interior, transmitting, In response to resolution of February 14, 1891, information relative to instructions touching allotments of land on the Potawatomie Reservation," S. Exec. Doc. No. 64, 51st Cong., 2d Sess. (1891) at 2-3. The Commissioner's 1887 letter stated that, in 1875, 131 allotments had been approved for members of the Citizen Band and 327 for Absentee Shawnees. The letter also indicated, however, that only 11 allotment certificates were actually issued. Those were issued in 1884 and 1885 to the Citizen Band members who had paid for their allotments.

8/ All further references to the United States Code are to the 1994 edition.

As originally enacted, section 1 of the General Allotment Act

the Secretary of the Interior determined that allotments within the Potawatomi Reservation could be made to Citizen Band members and Absentee Shawnees under the General Allotment Act. S. Exec. Doc. No. 64 at 5-6. The President approved the Secretary's determination on May 24, 1887. Id. at 6. Thereafter, allotments were made to both Citizen Band members and Absentee Shawnees under the General Allotment Act.

The Act of Mar. 3, 1891, 26 Stat. 989 (1891 Act) , confirmed a June 25, 1890, agreement with the Citizen Band, 26 Stat. 1016, and a June 26, 1890, agreement with the Absentee Shawnee Indians, 26 Stat. 1019, both providing for cession of all lands within the Potawatomi Reservation. In Article II of each agreement, the allotments made under the General Allotment Act were confirmed, and further provisions concerning allotment were set out. In Article IV of each agreement, the United States agreed to make monetary payments ($160,000 to the Citizen Band and $65,000 to the Absentee Shawnees) "for making homes and other improvements on the(ir) said allotments." In both cases, the payments were to be made per capita. 9/

The land ceded under the two agreements was opened to non-Indian settlement by Presidential Proclamation of Sept. 18, 1891, 27 Stat. 989, 990.

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fn. 8 (continued)
provided:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands on said reservation in severalty to any Indian located thereon."

Appellant objects to consideration of any legislation other than the 1872 Act on the grounds that it is "new evidence" which was not timely made a part of the record (Citizen Band's Reply Brief at 3). 43 CFR 4.24(b) authorizes the Board to take official notice "of the public records of the Department of the Interior and of any matter of which the courts may take judicial notice." Accordingly, the Board can, and will, consider all relevant statutes, legislative history, and public records of the Department, regardless of whether those materials were included in the administrative record prepared by BIA or whether they were cited by any party to the appeal.

9/ Article III of the Citizen Band agreement stated that 1400 Citizen Band members had been determined to be entitled to take allotments and that, should more than that number receive allotments, one dollar per acre of each allotment in excess of 1,400 would be deducted from the sum to be paid the Citizen Band under Article IV.

Article III of the Absentee Shawnee agreement contained a similar provision, except that the total number of allotments to Absentee Shawnees was stated to be 650.

In Indian Claims Commission Docket 96, the Citizen Band sought compensation for lands in the Potawatomi Reservation, including the lands allotted to Absentee Shawnees. The United States contended, inter alia, that the Citizen Band had never become entitled to, or had waived its right to, the lands allotted to the Absentee Shawnees. The Commission rejected that argument. 6 Ind. Cl. Comm. at 663-64. It continued:

> It is undisputed that the Absentee Shawnee's possession of such Oklahoma lands were not "locations made for them" by the Government. They were, as defendant [i.e., the United States] states, "in the nature of squatters" * * * whose possession was neither from time immemorial nor was their possession of lands within the Oklahoma Reservation obtained under any color of title or recognition of ownership by the Congress or the exclusive [sic, probably should be "executive"] branch of the Government or by the Citizen Band. * * *
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> The agreement of June 26, 1890 (26 Stat. 1019) wherein the Absentee Shawnee ceded the entire Oklahoma Reservation for a consideration of $65,000 and confirmation of their allotments cannot be construed as a ratification of a "reservation title" or of a use and occupancy title from time immemorial. Their possessory right was in the nature of a tenancy at will, they were in "peaceable possession" after the arrival of the Citizen Band only because the Citizen Band expressed a willingness not to disturb them provided the Government extended the Citizen Band's reservation to include an equivalent area westward.

6 Ind. Cl. Comm. at 664-65. The Commission held that the Citizen Band had "established a compensable right and interest to the extent of full ownership in and to the 575,877 acres of land known as the Oklahoma Reservation" and that the Band was "entitled to claim additional compensation for 362,832.22 acres of said Oklahoma Reservation land, being the excess over allotments to [its] members." Id. at 665.

On August 27, 1968, the Commission determined that the Citizen Band was entitled to recover $797,508.99 for the taking. 19 Ind. Cl. Comm. 368, 384 (1968). The funds to pay this award were appropriated by the Act of July 22, 1969, 83 Stat. 49, 62, and use of the funds was authorized by the Act of Sept. 16, 1970, 84 Stat. 838.

Standard of Review

The regulations in 25 CFR Part 151 concern the manner in which the Secretary is to exercise his authority to acquire land in trust for Indians and Indian tribes. The Secretary's statutory trust acquisition authority is broadly discretionary. See 25 U.S.C. § 465. 10/

10/ 25 U.S.C. § 465 provides: "The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to land, within or without existing reservations * * * for the purpose of providing lands for Indians."

See also, e.g., Florida v. United States Department of the Interior, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). However, in promulgating the regulations in 25 CFR Part 151, BIA has imposed some limitations on the exercise of its discretion. It has, for instance, distinguished between on-reservation and off-reservation trust acquisitions and, as relevant here, has given tribes veto power over certain acquisitions within their reservations, when the acquisitions are sought by other tribes or members of other tribes.

25 CFR 151.2(f) defines "Indian reservation" for purposes of trust acquisitions under Part 151:

> Unless another definition is required by the act of Congress authorizing a particular trust acquisition, "Indian reservation" means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, "Indian reservation" means that area of land constituting the former reservation of the tribe as defined by the Secretary.

The last part of this definition is relevant here. Thus, for purposes of trust land acquisitions under Part 151, the "former reservation(s)" of the Citizen Band and/or the Absentee-Shawnee Tribe are to be "defined by the Secretary." The regulation sets no standards for the exercise of the Secretary's authority to define a former reservation. Neither the Citizen Band nor the Area Director specifically addresses the scope of the Secretary's authority in this regard. 11/

[1] It is perhaps arguable that BIA has some leeway in defining a former reservation for purposes of the discretionary land acquisition authority and that the Board therefore has limited authority to review the BIA decision in light of 43 CFR 4.330(b)(2). However, in the one case in which it has addressed BIA's authority under subsection 151.2(f), the Board recognized, although it did not discuss at length, the need for legal and historical underpinnings for BIA's definitions of former reservations under

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11/ The Citizen Band's briefs evidence some confusion between the Secretary's authority to "define" a former reservation under 25 CFR 151.2(f) and any authority the Secretary may have to "proclaim" or "create" Indian reservations. The Secretary has authority under 25 U.S.C. § 467 to proclaim Indian reservations with respect to lands acquired in trust under 25 U.S.C. § 465. That authority, however, does not apply to lands acquired for Indian tribes in Oklahoma. See 25 U.S.C. § 473. The Board is not aware of any other statutory authority under which the Secretary may proclaim Indian reservations.

However, the Secretary does not, by "defining" a former reservation under 25 CFR 151.2(f), purport to proclaim or create a true reservation or to vest the defined area with the attributes of reservation status for jurisdictional purposes. Rather, the Secretary simply describes areas with respect to which the reservation-based provisions of 25 CFR Part 151 will apply.

this subsection. Kialegee Tribal Town v. Muskogee Area Director, 19 IBIA 296 (1991). The Board concludes that the better view is that BIA's determination concerning former reservation status is a legal conclusion subject to de novo review by the Board. Cf. Baker v. Muskogee Area Director, 19 IBIA 164, 169, 98 I.D. 5, 7 (1991) (A BIA conclusion concerning statutory authority for trust acquisitions is a legal conclusion subject to full Board review).

Discussion and Conclusions

On appeal to the Board, the Citizen Band contends that the Indian Claims Commission decision in Docket 96 is controlling on the question of present-day rights in the Potawatomi Reservation for purposes of 25 CFR Part 151. The Area Director counters that the Commission's decision is not controlling here because the Commission's jurisdiction was limited to the award of money damages and did not include the authority to quiet title to Indian land or to determine reservation status.

The Citizen Band appears to be contending that the issue in this case is the same, or similar to, the issue considered by the Indian Claims Commission. That is clearly not the case. The holding in the first phase of Docket 96 was, as stated above, that the Citizen Band had established "a compensable right and interest to the extent of full ownership in and to the 575,877 acres of land known as the Oklahoma Reservation." 6 Ind. Cl. Comm. at 665. In the second phase of the proceedings, in which the issues of valuation and consideration were considered, the Commission accepted June 25, 1890, as the valuation date. 12/ This date is, in essence, the date upon which the Citizen Band was deemed to have been deprived of the lands for which it was to be compensated, i.e., all lands of the reservation except the lands allotted to its own members. Thus, the effect of the Commission's decision was to determine ownership of the reservation lands on June 25, 1890, immediately prior to the taking. The fact that the Citizen Band owned these lands on June 25, 1890, however, is not determinative of rights in the reservation after that date. For one thing, some of the lands for which the Commission awarded compensation to the Citizen Band were the lands allotted to Absentee Shawnees. Thus, one obvious question which follows from the Commission's decision is whether, by taking those lands from the Citizen Band and allotting them to Absentee Shawnees, the United States gave the Absentee-Shawnee Tribe a right in the reservation, and/or recognized the Absentee-Shawnee Tribe as having a right in the reservation.

The difference between the issue addressed by the Indian Claims Commission in Docket 96 and the issue presented here is well illustrated by reference to the history of the Wind River Reservation in Wyoming, which bears a resemblance to the history of the Potawatomi Reservation. By treaty of July 3, 1868, 15 Stat. 673, a reservation, now known as the Wind River Reservation, was "set apart for the absolute and undisturbed use and

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12/ This date was arrived at by stipulation. 14 Ind. Cl. Comm. 570, 586 (1964). As indicated above, June 25, 1890, was the date of the agreement between the Citizen Band and the United States, which was ratified by the 1891 Act.

occupation of the Shoshonee Indians." 13/ However, in 1878, without the consent of the Shoshone Tribe, a band of Arapahoes was brought to the reservation by military escort and settled there. Thereafter, the Federal Government, including Congress, treated the reservation as jointly owned by the two tribes, despite the protests of the Shoshone Tribe. In 1897 and 1905, Congress ratified agreements with both tribes, providing for the cession of land within the reservation and for allotments to members of both tribes. Following continued protests by the Shoshone Tribe, Congress in 1927 enacted a statute enabling the Shoshone Tribe to sue in the Court of Claims for claims arising out of the 1868 treaty and/or subsequent agreements. 14/ Ultimately, it was determined that the United States had taken a half interest in the lands of the reservation in 1878, when the Arapahoes were first settled there. The Shoshone Tribe was determined to be entitled to compensation for that taking. Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937).

The Supreme Court in Shoshone Tribe of Indians recognized that the Shoshone Tribe was the sole beneficial owner of the Wind River Reservation prior to 1878. It also recognized, however, that the Tribe was deprived of its sole ownership in 1878. Since that time, the United States has recognized the Shoshone Tribe and the Arapahoe Tribe as sharing both the ownership of tribal lands within the reservation and the right to govern the reservation. This recognition of shared rights in the reservation continues to the present day. See, e.g., 25 U.S.C. §§ 611-613; Shoshone and Arapahoe Indian Tribes v. Hodel, 903 F.2d 784 (10th Cir. 1990); Knight v. Shoshone and Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1982).

The Indian Claims Commission's decision in Docket 96 is binding on the Board as to the fact of a taking from the Citizen Band and as to the date of taking. While it is clearly relevant to this case, that decision does not dictate the resolution of the issue here.

The Citizen Band also suggests, although it does not explicitly contend, that the Board's decision here is controlled by certain statements

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13/ Art. II of the July 3, 1868, treaty provided:

"The United States further agrees that [the reservation] shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for use of said Indians."

14/ Prior to 1946, when the Indian Claim Commission was established, special jurisdictional statutes were enacted on a case-by-case basis, to permit Indian tribes to bring claims against the United States in the Court of Claims. See generally F. Cohen, Handbook of Federal Indian Law (1941) at 373-78.

made in the Tenth Circuit decision in Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier, supra. The court of appeals stated:

> On appeal, the BIA offers a copy of the 1872 Act giving the Secretary of the Interior the power to grant allotments to members of the Absentee-Shawnee tribe who fulfill certain requirements. This evidence is irrelevant as well as untimely.
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> The 1872 Act does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land for purposes of 25 C.F.R. § 151.8. It merely grants the Secretary of the Interior the power to allot land to individual Absentee-Shawnee tribesmen. The Act does not mention any power to allot lands to the Absentee-Shawnee collectively as a tribe. Moreover, as the Potawatomi tribe correctly point[s] out in its brief, this "interest" is merely an expectation of the Absentee-Shawnee tribe that the BIA will evaluate their applications as they would Potawatomi applications. * * * Until the BIA actually approves an individual Absentee-Shawnee application, this "interest" is inchoate. [Emphasis in original.]

17 F.3d at 1294.

The Area Director argues that the court of appeals' discussion is addressed solely to the issue before it, i.e., whether the Absentee-Shawnee Tribe was an indispensable party. Thus, he contends, "[t]he decision in no way addresses or even reaches the issue of whether the Absentee Shawnee [Tribe] has a former reservation interest in the tract equivalent to that of the Citizen Band" (Area Director's Answer Brief at 14-15). The Citizen Band acknowledges that the Tenth Circuit decision "only resolved the issue of indispensable party" but contends that "an administrative body would be ill-served by taking the BIA advice to ignore significant dicta from a circuit court of appeals decision relating to the same question" (Citizen Band's Reply Brief at 15).

The district court, following remand from the court of appeals, also suggested that the Tenth Circuit dicta be taken into account in any administrative review. However, the fact that the district court ordered the Citizen Band to pursue administrative remedies indicates that the court did not consider this Department to be precluded from considering the substantive issue raised by the Citizen Band. 15/

15/ Addressing counsel for the Citizen Band, the district court stated: "[It] looks to me like they [the administrative review forum] are the exact appropriate people to listen to this [the Citizen Band's argument on the merits]. You may well be right . And the 10th Circuit has said you're probably right. I would think they would take some guidance from the 10th Circuit opinion" (Transcript of Hearing on Motion to Dismiss, July 28, 1994, at 6).

The issue before the court of appeals was the procedural issue of the Absentee-Shawnee Tribe's status as an indispensable party, without whom the proceedings in Federal court could not continue. In order to address that issue, the court was compelled to address the merits of this matter to some extent. However, the court's discussion of the merits was quite limited. Of the several enactments affecting the Potawatomi Reservation, it mentioned only one, the 1872 Act. Further, in finding that the Government had failed to show that the Absentee-Shawnee Tribe was an indispensable party, the court specifically based its conclusion upon "the absence of evidence showing the nature of the Absentee-Shawnee tribe's interest in Potawatomi land," 17 F.3d at 1294, rather than upon the existence of evidence showing that the Absentee-Shawnee Tribe did not possess such an interest. Under these circumstances, the Board does not believe that the court of appeals intended, by its brief discussion of the merits of this matter, to preclude full consideration of the merits by the Department of the Interior upon a possible remand to exhaust administrative remedies. 16/ Therefore, the Board concludes that it may consider the merits here.

The history of the Potawatomi Reservation--in particular, the cession agreements, allotments to tribal members, and opening to non-Indian settlement--resembles the histories of other reservations throughout the country, many of which have been the subject of Supreme Court decisions concerning their present-day status as Indian reservations. See, e.g., Hagen v. Utah, 114 S.Ct. 958 (1994); Solem v. Bartlett, 465 U.S. 463 (1984). Typically, these cases revolve around statutes which, like the 1891 Act in this case, provided for allotments to tribal members and opened the "surplus" lands of the reservation to settlement by non-Indians. The usual question is whether a particular statute diminished or "disestablished" a reservation. The Supreme Court's decisions in these cases employ an analytical framework which is also useful here, despite the different issue in this case, because the same kind of statute is pivotal to the decision and because an important question here is whether, or to what extent, the 1891 Act diminished the rights of the Citizen Band in the Potawatomi Reservation. 17/ In addition to the reservation status

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16/ Indeed, it is a well-established principle of administrative law that Federal courts show deference to the interpretation of statutes made by agencies charged with the administration of those statutes. E.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984). This principle contemplates that the agencies will exercise their particular expertise in interpreting their own statutes and regulations in order to render final agency decisions.

In this case, the 19th century treaties and statutes concerning the Potawatomi Reservation were administered by the Department of the Interior. Moreover, in the context of the issue in this appeal, those treaties and statutes are to be construed for the purpose of implementing the Secretary's current statutory authority to take land in trust for Indians.

17/ As the last major congressional enactment concerning the Potawatomi Reservation, the 1891 Act is critical to the determination of its present-day status. This is readily apparent both as a matter of history and by reference to the date of taking established in Indian Claims Commission Docket 96, i.e., June 25, 1890, the date of the Citizen Band agreement ratified by the 1891 Act.

cases, the Supreme Court's decision in Shoshone Tribe of Indians is clearly relevant here, given the historical similarities of the situation addressed therein to that in the present case.

Guided by the principles developed in these Supreme Court decisions, the Board proceeds to the question of whether the present-day Potawatomi Reservation is the reservation (or former reservation) of the Citizen Band alone or whether it is the reservation of both the Citizen Band and the Absentee-Shawnee Tribe.

In the reservation status cases, the Supreme Court has made it clear that its task is to determine the intent of Congress. For that purpose, it has found the language of the particular statute at issue to be the most probative evidence. E.g., Hagen, 114 S.Ct. at 965; Solem, 465 U.S. at 470. So too, in Shoshone Tribe of Indians, among evidence of ratification of a taking, the Court found "most important of all, the statutes * * * recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits." 299 U.S. at 495.

The language of the 1891 Act indicates that Congress deemed the Absentee Shawnees to have an interest in the Potawatomi Reservation. In Article I of the ratified agreement with the Absentee Shawnees, the Absentee Shawnees ceded to the United States all "their claim, title and interest of every kind and character in and to" the lands within the reservation. Article II confirmed the allotments made to Absentee Shawnees under the General Allotment Act. 18/ Article IV provided:

> It is further agreed, as a further and only additional consideration for such relinquishment of all title, claim and interest of every kind and character, in and to such lands, the United States will pay to said Absentee Shawnees in said tract of country * * * the sum of sixty-five thousand ($65,000) dollars for making homes and other improvements on their said allotments.

The legislative history is consistent with the language of the statute. The House report states:

> The bill provides for the ratification of two agreements entered into on behalf of the United States by the Cherokee Commissioners, the first on the 25th day of June, 1890, with the Citizen Band of Potawatomi Indians; and the second on the

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18/ By authorizing allotments to Absentee Shawnees under the General Allotment Act, the Secretary of the Interior and the President had recognized some rights in the Absentee Shawnees to lands in the Potawatomi Reservation, because the General Allotment Act clearly contemplated that allotments within a reservation would be made to members of the tribes for whom the reservations had been created. See note 8, supra. To the extent the Secretary and the President might have erred in their legal conclusion, however, Congress cured the error by confirming the allotments.

> 26th day of June with the Absentee Shawnee Indians, all residing on the Potawatomi Reservation, in Oklahoma Territory, for the relinquishment of their respective rights upon and to said reservation [Emphasis added]."

H.R. Rep. No. 3481, 51st Cong., 2d Sess. 1 (1891). The same report notes, at pages 2-3, that the Absentee Shawnees "were not there [i.e., on the Potawatomi Reservation] by any treaty or Executive order, but the Government has long known of their presence there," and that "[t]he Commissioners agreed that they should be paid for the relinquishment of their claims, after taking allotments, $65,000."

In Shoshone Tribe of Indians, the Supreme Court described an agreement with the Shoshones and Arapahoes, analogous to the agreements ratified in the 1891 Act in this case, as one "with clear recognition of the occupancy of the Arapahoes and their equal interest in the land." 299 U.S. at 489. Moreover, as noted above, the Court found that the statutes at issue in that case "recogniz[ed] the Arapahoes equally with the Shoshones as occupants of the land, accept[ed] their deeds of cession, assign[ed] to the tribes equally the privilege of new allotments, and devot[ed] to the two equally the award of future benefits." Id. at 495.

Here also, Congress accepted a deed of cession from the Absentee Shawnees and authorized allotments to them. While it perhaps did not recognize equal rights in the two tribes, 19/ there is no doubt that Congress, despite its awareness that the Absentee Shawnees lacked formal permission to occupy the reservation, still believed that they had some rights in the reservation.

The Board finds that the language of the 1891 Act, together with congressional statements in the legislative history, support a conclusion that Congress intended to recognize some rights of the Absentee Shawnees in the Potawatomi Reservation.

In the reservation status cases, the Supreme Court has also taken into consideration the circumstances and events surrounding enactment of a statute opening a reservation to settlement. In Solem, the Court stated:

> When events surrounding the passage of a surplus land Act--particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress--unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

465 U.S. at 471. See also 114 S.Ct. at 965.

19/ See discussion, infra.

Accordingly, the Board considers the circumstances surrounding enactment of the 1891 Act. It is evident from various Department of the Interior documents that Departmental officials believed the Absentee Shawnees had some rights in the Potawatomi Reservation. Congress was made aware of those views through the Secretary's transmittals of several documents during the period immediately preceding enactment of the 1891 Act. 20/ Congress was also aware that the Commissioners who negotiated the cession agreement with the Absentee Shawnees in 1890 held a similar belief. See H.R. Rep. No. 3481, supra. Further, Congress must be deemed to have been aware of the legislation it had enacted 20 years earlier, in which it had authorized allotments to Absentee Shawnees within the Potawatomi Reservation.

The Board finds that the circumstances surrounding enactment of the 1891 Act are consistent with the language of the Act itself and, again, support a conclusion that Congress intended to recognize some rights of the Absentee Shawnees in the Potawatomi Reservation.

The next question is whether there has been any change in Congress' view of the Potawatomi Reservation since 1891.

In the reservation status cases, the Supreme Court has given some consideration to the history of a reservation subsequent to the statute opening it to settlement. In Solem, after discussing the weight given to events contemporaneous with the opening statutes, the Court continued:

20/ The Interior view is illustrated in the documents reprinted in S. Exec. Doc. 64, supra, a compilation furnished to Congress on Feb. 26, 1891. For instance, it is noted therein that the Absentee Shawnees had occupied some of the Potawatomi Reservation lands before the Citizen Band arrived and that "a feeling of uneasiness and insecurity has existed among [the Absentee Shawnees] since the settlement of the Pottawatomies upon the lands exclusively occupied by the former for more than 30 years" (S. Exec. Doc. 64 at 3). See also id. at 10. The documents also reflect the fact that, at the request of the Absentee Shawnees, the Department had undertaken to allot members of the two tribes in different parts of the reservation, in essence allowing the Absentee Shawnees to control "their" part of the reservation. Id. at 3-4, 7, 9-10, 13-14, 16-17. (The practice of geographically restricting Citizen Band allotments was disapproved in the 1891 Act. See 1891 Act, sec. 11, 26 Stat. 1021; H.R. Rep. No. 3481, 51st Cong., 2d. Sess. 2 (1891).)

Another document submitted to Congress the year before the 1891 Act was enacted was a general legal discussion of the Indians in Indian Territory. "Letter from the Secretary of the Interior, transmitting, In response to Senate resolution of March 10, 1890, the compilation concerning the legal status of the Indians in Indian Territory, 11 S. Exec. Doc. No. 78, 51st Cong., 1st Sess. (1890). Although less detailed, this document reflects the same point of view as does S. Exec. Doc. No. 64. See, e.g., page 20: "Under date of May 23, 1887, the Secretary of the Interior decided that both the Citizen Band of Pottawatomies and the Absentee Shawnees having been located on their reservation under the act of 1872, and being so located, they come within the provisions of the [General Allotment Act]." (Emphasis added.)

> To a lesser extent, we have also looked to events that occurred after the passage of a surplus land Act to decipher Congress' intentions. Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands.

465 U.S. at 471.

Here, subsequent events might be examined for the purpose of shedding further light upon Congress' intent in 1891 and also for the purpose of determining whether Congress has taken any action to alter the result it evidently intended in 1891.

This effort is hampered to some extent by the fact that Indian reservations an Oklahoma have generally been presumed, whether rightly or wrongly, to have been terminated by the statutes which opened them to non-Indian settlement. See, e.g., Cohen's Handbook of Federal Indian Law 775-76 (1982 ed.). 21/ Presumably, it is because many of the usual reservation-based issues have simply not arisen with respect to the Potawatomi Reservation that there has been little need to address the question of rights in the reservation.

Congress has, however, legislated on three occasions concerning certain lands within the Potawatomi Reservation. In 1960, it authorized the conveyance of a 57.99-acre tract to the Citizen Band "subject to the right of the Absentee Shawnee of Oklahoma, Sac and Fox of Oklahoma, Kickapoo of Oklahoma, and Iowa Tribe of Oklahoma to use the Potawatomi community house that may be constructed and maintained thereon." Act of Sept. 13, 1960, 74 Stat. 903. Prior to the conveyance, the land had been used by the Government as an Indian school farm.

In 1964, Congress authorized the conveyance of six tracts, totalling approximately 222 acres, to the Citizen Band, and one tract, containing 33.23 acres, to the Absentee-Shawnee Tribe. Act of Aug. 11, 1964, 78 Stat. 292. The seven tracts had been part of the Shawnee Indian School and Agency Reserve.

21/ With respect to most of the original reservations in Oklahoma, there have been no definitive adjudications concerning their present-day status. The Board is not aware of any such adjudication concerning the Potawatomi Reservation.

In recent years, the Federal courts have come to regard tribal trust lands in Oklahoma as "informal" reservations, and thus "Indian country" for jurisdictional purposes. E.g., Oklahoma Tax Commission v. Chickasaw Nation, 115 S.Ct. 2214, 2217 n.2 (1995); Oklahoma Tax Commission v. Sac & Fox Nation, 113 S.Ct. 1985, 1991 (1993) ; Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); Cheyenne-Arapaho Tribes v. Oklahoma, 618 F.2d 665 (10th Cir. 1980). These decisions proceed from the premise, spoken or unspoken, that the original reservations are extinct.

The Senate and House reports on the 1960 and 1964 statutes all stated that the land conveyed was "part of a large area ceded to the United States by the Citizen Band and the Absentee Shawnee Indians in an agreement ratified by the act of March 3, 1891 (26 Stat. 1016)" (S. Rep. No. 1605, 86th Cong., 2d Sess. 2 (1960). Accord H.R. Rep. No. 1661, 86th Cong., 2d Sess. 2 (1960); S. Rep. No. 1255, 88th Cong., 2d Sess. 1 (1964); H.R. Rep. No. 1490, 88th Cong., 2d Sess. 2 (1964).

Both the 1960 and 1964 Acts authorized conveyance of the subject tracts to the tribes in fee status. In 1975, Congress authorized the tribes to reconvey the tracts to the United States, to be held in trust for the tribes. Act of Jan. 2, 1975, P.L. 93-590, 88 Stat. 1922 (Absentee Shawnee Tribe); Act of Jan. 2, 1975, P.L. 93-591, 88 Stat. 1922 (Citizen Band).

In conveying lands within the former reservation to both tribes, and in referencing the 1890 cessions by both tribes, Congress acted consistently with the 1891 Act, recognizing both tribes as having rights in the reservation. 22/

The Board is not aware of any other 20th century legislation specifically dealing with lands or rights in the Potawatomi Reservation.

With respect to BIA's practice in this century, the Citizen Band and the Area Director agree that BIA has consistently treated the area as the shared former reservation of the two tribes. The Citizen Band, in fact, specifically complains of this practice on the part of BIA. See Citizen Band's Opening Brief at 9; Reply Brief at 9.

As evidence of BIA's present position, the Area Director cites the Absentee-Shawnee Tribe's Self-Governance Compact and its Constitution. The Self-Governance Compact was signed by the Tribe's Governor and the Assistant Secretary - Indian Affairs on September 25, 1990. It includes funding for, inter alia, law enforcement and tribal courts, thus evidencing BIA recognition of the Absentee-Shawnee Tribe's authority to exercise some degree of territorial jurisdiction. The present Absentee-Shawnee Constitution was approved by the Acting Deputy Commissioner of Indian Affairs on February 4, 1977. An amendment to the jurisdictional provision was approved by the

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22/ There is, of course, a substantial difference in the amount of land conveyed to the two tribes. In Apr. 1, 1964, letters reprinted in S. Rep. No. 1255 and H.R. Rep. No. 1490, the Assistant Secretary of the Interior indicated that the division of land in the 1964 statute was made pursuant to an agreement between the tribes:

"This bill is the result of a great deal of planning between the two tribes regarding the use of lands that are no longer needed by the Federal Government for the purposes for which they were reserved. The tribes have agreed to the division of the lands as indicated in the bill. Each tribe will receive land for which plans have been Trade as to its best ultimate use." (S. Rep. No. 1255 at 3; H.R. Rep. No. 1490 at 3-4).

Area Director on April 13, 1988. 23/ BIA's approval of these documents is further evidence that BIA has recognized some Absentee-Shawnee territorial jurisdiction within the original reservation boundaries. The Citizen Band concedes that the lands referred to in the Absentee-Shawnee Constitution are "areas of land within the Potawatomi Reservation where the Absentee Shawnee arguably do have some tribal jurisdiction, to-wit the lands presently held in trust for the Absentee-Shawnee or lands previously allotted to individual Absentee-Shawnee members" (Citizen Band's Reply Brief at 5). It appears likely that the territorial jurisdiction presently exercised by the Absentee-Shawnee Tribe is consistent with the "Indian country" jurisdiction recognized by the Federal courts. See note 21, supra. The Citizen Band does not discuss its own territorial jurisdiction or the extent to which BIA has recognized that jurisdiction. Presumably, however, the Citizen Band exercises jurisdiction over present-day Citizen Band "Indian country." See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, supra. In any event, the Citizen Band does not contend that it retains territorial jurisdiction over the entire former Potawatomi Reservation. 24/

23/ The 1977 Constitution provided, in Article II, Jurisdiction:

"The jurisdiction of the Absentee-Shawnee Tribe shall extend to all tribally owned land and all restricted or trust land belonging to tribal members within the boundary of the reservation established by Agreement dated June 26, 1890, and ratified by the Act of March 3, 1891 (26 Stat. 1019), and such other land, or interest in land, which may be subsequently acquired."

As amended in 1988, Article II provides:

"Section 1. The jurisdiction and governmental powers of the Absentee-Shawnee Tribe of Indians of Oklahoma shall, consistent with applicable federal law, extend to all persons and to all real property, including lands and natural resources, and to all water and air space within the Indian Country, as defined in 18 U.S.C. § 1151 or its successor, over which the Absentee-Shawnee Tribe of Indians of Oklahoma has authority within the boundary of the tribal jurisdiction established by Agreement dated June 26, 1980 [sic] and ratified by the Act of March 3, 1891 (26 Stat. 1019), and such other land or interest in land, which may be subsequently acquired.

"Section 2. The jurisdiction and governmental powers of the Absentee-Shawnee Tribe of Indians of Oklahoma shall also, consistent with the applicable federal law, extend outside the exterior boundaries of the Absentee-Shawnee Tribe of Indians of Oklahoma.

"Section 3. The exercise by the Tribe of its jurisdiction and governmental powers shall be incorporated in appropriate legislation enacted by the Tribe and embodied in a tribal code in order to promulgate procedural rules for a tribal judicial system, and to establish and provide for a tribal law enforcement agency, tribal regulatory bodies and other appropriate administrative agencies of the Tribe."

24/ In a sense, of course, the Citizen Band's contention that it has authority to veto Absentee-Shawnee land acquisitions under 25 CFR 151.8 is an assertion of territorial jurisdiction over the entire former reservation. However, the Citizen Band makes no claim that it may exercise such

The Board finds, in light of the parties' general agreement on the point, that BIA has consistently treated the Potawatomi Reservation as the shared former reservation of the two tribes.

[2] The Board finds nothing in the history of the Potawatomi Reservation subsequent to 1891 which alters Congress' recognition in the 1891 Act of Absentee Shawnee rights in the Potawatomi Reservation. Accordingly, the Board finds that the Absentee-Shawnee Tribe has present-day rights in the Potawatomi Reservation which may be recognized by BIA for purposes of 25 CFR 151.8.

It is not clear that Congress intended in the 1891 Act to recognize precisely equal rights in the two tribes. Both the monetary payments to the two tribes ($160,000 to the Citizen Band and $65,000 to the Absentee Shawnees) and the number of allotments recognized for each tribe (1,400 for Citizen Band members and 650 for Absentee Shawnees) were substantially different. The difference in the number of allotments can undoubtedly be attributed to population differences between the two tribes. It is possible that the difference in the monetary payments can also be attributed in part to population differences, because the payments were to be made per capita, for the purpose of "making homes and other improvements on the said allotments." As noted above, the 1960 and 1964 statutes conveyed substantially different amounts of land to the two tribes. However, the differences with respect to the lands conveyed in 1964 were explained in the legislative history as based upon an agreement between the two tribes, see note 22, supra, and thus may not represent any understanding on the part of Congress that the rights of the tribes were unequal.

The Board reaches no conclusion on this point because it finds it unnecessary to do so. Assuming arguendo that, at the present time, the Citizen Band has a greater interest in the reservation than does the Absentee-Shawnee Tribe, there is no obvious way for BIA to deal with that fact for purposes of trust acquisitions under 25 CFR Part 151, unless, perhaps, it is by some artificial geographic division of the reservation. In view of Congress' 1891 disapproval of BIA's attempts to divide the reservation, see note 20, supra, the Board finds that neither it nor BIA may now order such a division. 25/

In order to avoid future conflicts, the two tribes may wish to consider negotiating an agreement concerning trust acquisitions. However, absent such an agreement, the Board finds that it is reasonable for BIA to treat the entire former Potawatomi Reservation as the reservation of both tribes for purposes of 25 CFR Part 151.

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fn. 24 (continued)
governmental powers as law enforcement or taxation over the former reservation as a whole. 25/ Practical considerations may also prevent such a division, if the present-day landholding of the tribes and their members are intermingled.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's September 17, 1992, decision is affirmed.

_____
Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge